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No. 59477-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AFSHIN PISHEYAR,

Appellant/Cross-Respondent,

v.

RICHARD M. SNYDER, et ux., and DAVID HANNAH, et ux., et al.,

Respondents/Cross-Appellants.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

In this reply brief, Snyder and Hannah strictly address the arguments that Pisheyar made in opposition to Snyder's and Hannah's cross-appeal of the trial court's erroneous ruling regarding Pisheyar's corporate perquisite claims. The trial court ruled that Pisheyar could pursue personal damages on his corporate perquisites claims involving the alleged denial of such things as sports tickets and demo cars. For damages resulting from these allegedly personal claims, however, Pisheyar asked only for his former share (19%) of the moneys that he claims the Corporations wrongly spent. The trial court's ruling was error because all of Pisheyar's claimed personal damages relate to alleged loss to the Corporations, rather than Pisheyar individually, and as such should have been dismissed as derivative, just as his other derivative claims were dismissed.

Pisheyar's Response fails to respond directly to almost all of the arguments that Snyder and Hannah made for reversal on this issue. To the extent he does respond, his Response is not supported by the facts or the law. This Court should reverse the trial court's denial of partial summary judgment as to the corporate perquisite claims and dismiss those claims.

II. ARGUMENT

A. Pisheyar's Corporate Perquisite Claims Are Derivative, Not Personal, Because He Alleges Exclusively Damage to the Corporations

The trial court correctly concluded that any "claims for damages arising out of [Pisheyar's] claims that [Snyder's and Hannah's] conduct resulted in reduced corporate profits or increased corporate expenses, and therefore reduced dividend distributions" are "derivative in nature." CP 528. Pisheyar's corporate perquisite claims are exactly that—claims that unequal distribution of benefits in effect reduced dividends to which he was due. As he articulated these claims, Pisheyar is complaining that Snyder and Hannah received something from the Corporations which he did not, and because he is entitled to 19% of anything and everything from the Corporations, he was denied part of his 19%. His corporate perquisite claims therefore are exactly like all of his other claims, with a slightly different twist. Accordingly, they also should have been dismissed, and the trial court erred in failing to do so.

In response to this argument that these corporate perquisite claims fail as a matter of law, Pisheyar offers a confusing, irrelevant argument about what Snyder and Hannah argued in a motion to dismiss Pisheyar's original complaint almost three years ago. Reply Br. App. at 21. But his position about what was argued is wrong and in any event is irrelevant to this issue; it certainly has nothing to do with the trial court's ruling.

In April 2005, several weeks after Pisheyar filed his original complaint and before the parties had conducted any discovery, Snyder and

Hannah moved to dismiss Pisheyar's complaint, including his corporate perquisite claims, because Pisheyar purported to simultaneously be bringing claims on behalf of and against the Corporations. Like all motions brought under Civil Rules 12 and 23.1, this was a motion based on the pleadings alone – at that time, only Pisheyar's complaint – and not on facts uncovered during discovery. Snyder and Hannah argued that Pisheyar's claims were defective because he sought individual recovery for claims that were pleaded as derivative (like the corporate perquisites claims) and derivative recovery (for the Corporations) for claims that were pleaded as individual.[1] CP 3296-3325.

The trial court denied that motion on July 1, 2005; discovery commenced; and Pisheyar continued to assert that he could recover both derivatively and individually for various alleged improper conduct by Snyder and Hannah. Through discovery, it became clear that all of the alleged damage to Pisheyar – however labeled, whether derivative or individual – rested firmly on allegations of harm to the Corporations. Indeed, by the time discovery closed – which it did only after Pisheyar had been repeatedly ordered to comply with his discovery obligations and sanctioned for his failures to do so – the ***only*** damages that Pisheyar had identified for his corporate perquisites claims (which he asserts are

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[1] Snyder and Hannah correctly forecasted Pisheyar's inability to prove up any damages to the Corporations. CP 3303 ("[Pisheyar's] claims turn entirely on his personal dissatisfaction about business decisions that have caused no harm to the [Corporations] . . . [Pisheyar] does not allege – and cannot allege – that the [Corporations] have been injured by [Snyder's and Hannah's] challenged conduct.").

individual) were the diminution in value of his shares in the Corporations. See, e.g., CP 2342; see also Br. Resp. at 20, 22, 23, 40.

Specifically, Pisheyar's only articulation of monetary damages related to the corporate perquisites claims was the sum of $170,000, which Pisheyar explained as:

> . . . [his] best estimate based upon his knowledge of the automobile industry in general and this business in particular . . . this amount includes the damages sustained by Mr. Pisheyar because the Defendants used earnings of the company to benefit themselves to the exclusion of Mr. Pisheyar such as sporting event tickets, excess insurance, demo cars, etc. using Mr. Pisheyar's share of the profits to do so.

CP 4844. Thus Pisheyar's perquisite damages theory appears to be that Snyder and Hannah improperly used corporate funds to benefit themselves personally. If that were true (it is not), then the Corporations would be harmed by such acts, and the harm to the Corporations and their shareholders would be expressed in a reduced distribution to shareholders such as Pisheyar. But, as the trial court ruled, and Pisheyar himself points out, where a corporation suffers the alleged harm, the action is derivative. See Reply. Br. App. at 22 (citing Haberman v. Washington Pub. Power Supply Sys., 109 Wn.2d 107, 147, 744 P.2d 1032 (1987)). As Snyder and Hannah addressed in their prior brief, harm to the Corporations must be addressed in this instance in the Appraisal Proceeding as an assessment of the fair value of Pisheyar's shares. Br. Resp. at 26. Any other result would permit Pisheyar to seek double recovery for his harms.

Remarkably, Pisheyar claims that he is not "seeking double recovery" in the Appraisal Proceeding because he is the defendant and not the plaintiff in that action. Reply Br. App. at 2, 4-5. This argument is specious at best. Because Pisheyar rejected the Corporations' valuation of his shares and Sound Infiniti rejected Pisheyar's counter-valuation, the Act *required* Sound Infiniti to initiate an action in superior court to resolve the issue. See RCW 23B.13.300 ("If a demand for payment . . . remains unsettled, the corporation *shall* commence a proceeding within sixty days after receiving the payment demand and petition the court to determine the fair value.") (emphasis added). The fair-value-focused appraisal remedy protects shareholders, including Pisheyar, from corporate stonewalling over valuation. Thus, the sole issue in the Appraisal Proceeding is the fair value of Pisheyar's shares – i.e., whether he is entitled to a larger payment than he has already received. That he is a defendant and not a plaintiff in the Appraisal Proceeding does not change the fact that Pisheyar seeks to receive more money in the Appraisal Proceeding.

Pisheyar's corporate perquisite damages theory is merely another label for the same corporate damage theory that the trial court properly rejected. Pisheyar continues in this Court to wrongly confuse and attempt to blur derivative and individual claims and damages theories. Because, as the trial court concluded, Pisheyar himself articulated his alleged individual damages as premised only on the purported diminution in the value of his shares in the Corporations, his individual perquisite claims are necessarily derivative, and should be dismissed.

B. Even If the Corporate Perquisite Claims Are Personal and Not Derivative, They Fail Because There Is No Evidence of Entitlement to Perquisites or Any Actual Damages

1. Pisheyar Offers No Evidence of Any Entitlement to the Corporate Perquisites

Pisheyar failed entirely to establish that as a shareholder he was even entitled to the alleged perquisites he complains were denied. Pisheyar had no role in the management of either dealership and, other than his roles as Secretary of Sound Infiniti and as a director of Infiniti of Fife, was strictly an investor. CP 257 ¶ 26. He was solely a shareholder. Shareholders are not entitled to employee incentives and benefits.[2] "Without a veto power, a minority shareholder [like Pisheyar] has no control over ... bonuses, fringe benefits, or excessive travel and entertainment expenses . . ." Whetstone v. Hossfeld Mfg. Co., 457 N.W.2d 380, 384 (Minn. 1990). Thus Pisheyar can cite no legal authority in support of his contention that he should have received 19% of the Corporations' so-called perquisites. Benefits that go to employees do not go to shareholders.

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[2] As a shareholder in the Corporations, Pisheyar's rights were limited to those enumerated in the Washington Business Corporation Act. The Act provides that shareholders are entitled to be notified of and attend an annual shareholders meeting (RCW 23B.07.010(1); .050(1)), to call special meetings (RCW 23B.07.020(1)(b)), to elect and remove directors (RCW 23B.07.010(1); .08.080), to inspect corporate records and annual financial statements (RCW 23B.16.010(1); .020; .200), to vote on fundamental business changes initiated by the board (RCW 23B.11.030(2)(b); .12.020(2)(b); .14.020(2)(b)), and to amend the bylaws and articles of incorporation as initiated by the board (RCW 23B.10.030; .200). Moreover, the trial court rejected Pisheyar's argument that he was an employee of the Corporations, Pisheyar attempted to raise that issue on appeal, and this Court rejected interlocutory review of that issue.

Pisheyar also appears to argue that he was damaged because an agreement between the parties entitled him to a new demo car and he received only a used one. See Reply Br. App. at 23 (citing CP 2649-50). But the only agreement that relates to demo cars is a buy/sell agreement for Infiniti of Tacoma, and Pisheyar has admitted that he received a new demo car at all relevant times from Infiniti of Tacoma. Pisheyar has cited no evidence (because there is none) that he was entitled to a new demo car from Sound Infiniti.

Moreover, in addition to the lack of evidence of any legal entitlement to the allegedly-denied corporate perquisites, Pisheyar does not point to any facts in the record suggesting that the alleged corporate perquisites were ever even provided to any other shareholders in the Corporations, much less any other similarly situated shareholders (i.e. minority shareholders). Indeed, the only evidence in the record relating the Corporations' provision of corporate perquisites to minority shareholders is Snyder's testimony that, as a minority shareholder in Sound Infiniti (and a much larger minority shareholder than Pisheyar), he never received any tickets to sports events from Sound Infiniti. CP 3064.

Thus, even if Pisheyar had a legally sustainable claim for individual corporate perquisites, which he does not, there are no facts in the record which provide any basis for an assertion that he was entitled to such perquisites. This provides an independent ground on which to reverse the trial court.

2. Pisheyar Fails to Cite to Any Evidence in the Record That Demonstrates Damages Beyond Mere Speculation

"The rule is that the plaintiff must produce the best evidence available and it must be sufficient to afford a reasonable basis for estimating his loss before he will be in a position to demand the court fix the amount of his damages." B. & B. Farms, Inc. v. Matlock's Fruit Farms, Inc., 73 Wn.2d 146, 151, 437 P.2d 178 (1968) citing Dunseath v. Hallauer, 41 Wn.2d 895, 253 P.2d 408 (1953). The purpose of this requirement "is to spare the trier of fact the onus of an attempt to assess damages solely by speculation and conjecture and *without the benefit of probative evidence on the issue."* Jacqueline's Washington, Inc. v. Mercantile Stores Co., 80 Wn.2d 784, 786, 498 P.2d 870 (1972) (emphasis added). For example, in ESCA Corp. v. KPMG Peat Marwick, the court reversed an award of damages to the plaintiff where the plaintiff's assertion of damages was based entirely on the "subjective" testimony of one director of the plaintiff corporation. 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), aff'd, 135 Wn.2d 820, 959 P.2d 651 (1998). The court concluded that "the goal of awarding money damages is to compensate for losses that are actually suffered" and held that the director's testimony was "speculative and self serving at best" and "patently insufficient to establish damages." Id. at 638, 641.

At the trial court and again in this Court, Pisheyar has been unable to point to any evidence supporting either actual damages or quantification of the alleged harm related to his corporate perquisite claims. In his Response, he cites to only five (5) pages of the record, none of which

provide any facts other than naked assertions devoid of any evidentiary value. Reply Br. App. at 23. CP 13 is a Pisheyar declaration in which he describes the claims he has alleged, not competent evidence supporting those claims. CP 573-74 is another Pisheyar declaration, tangentially relating to the provision of demo cars, but focusing on alleged tax reporting problems. And CP 2649-50 are interrogatory answers also relating to the provision of demo cars and citing the Infiniti of Tacoma agreement under which, as described above, Pisheyar admits he received what he was due. Pisheyar does not cite to any facts relating to sports tickets or trips or other allegedly denied corporate perquisites. Nor are any of Pisheyar's citations to alleged damages in other sections of his brief availing.[3] Reply Br. App at 16.

Bare assertions such as these stand alone to quantify Pisheyar's supposed damages arising from his perquisite claims. This is the complete record; the trial court precluded Pisheyar from relying at trial on any other evidence relating to his alleged personal damages. CP 528-29.[4] Even if there were any other facts in the record to support the perquisite claims, which there are not, an appellate court is "not required to search the record for applicable portions . . . in support of . . . plaintiffs' arguments."

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[3] Indeed, Pisheyar appears to rely for damages on claims that have been dismissed by the trial court and/or are not on appeal. Reply Br. App. at 17, 18 (discussing Pisheyar's claims for wrongful exclusion from Nissan Eastside and wrongful termination).

[4] Contrary to Pisheyar's claim, Reply Br. App. at 15, it is this order (CP 527-29) and Pisheyar's repeated refusal to comply with his discovery obligations that limited Pisheyar's ability to present evidence of his damages at trial. This, and the fact there is no such evidence to present.

Mills v. Park, 67 Wn.2d 717, 721, 409 P.2d 646 (1966). Just as in ESCA, Pisheyar's reliance solely on his own subjective "best estimate" of damages is plainly insufficient.

Therefore, this Court can reverse the trial court on this perquisite issue on the independent basis that Pisheyar failed to offer any legally sufficient evidence of any perquisite damages. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

C. Pisheyar Does Not Address Many of Snyder's and Hannah's Arguments

Pisheyar's response is also notable for what it does not address. Pisheyar entirely fails to respond to Snyder's and Hannah's multiple arguments providing grounds for reversal of the trial court and dismissal of the corporate perquisites claims.

Three examples of Pisheyar's failure to address critical issues and arguments will suffice. First, Snyder and Hannah argued that, because Pisheyar's corporate perquisite damages were expressed as a proportion of alleged damage to the Corporations, they could not be individual damages. Br. Resp. at 40. Pisheyar fails to respond. Second, Snyder and Hannah also asserted that, even if the corporate perquisite claims were personal and not derivative, Pisheyar still failed to present competent evidence as to the amount of his individual damages. Br. Resp. at 41. Pisheyar does not address this issue either. Third, Snyder and Hannah contended that, with respect to several of the corporate perquisite claims, there was *no evidence* in the record relating to those claims. Br. Resp. at 8. As detailed above,

Pisheyar provides citations only to his naked, unsupported statements about demo cars and provides no factual support whatsoever for the other allegedly denied corporate perquisites.

Pisheyar's silence on these and other issues is telling. He has no answers to why his corporate perquisite claims are really derivative. He has no answers to why, after nearly 18 months of discovery, the only evidence that he offered in response to summary judgment motions that he had been damaged individually was his own unsupported "estimates" of damage to the *Corporations*. For the reasons argued in Snyder's and Hannah's opening brief—and for the very same reasons that this Court should affirm the trial court's dismissal of the other claims—the perquisite claims are legally defective and factually deficient. The trial court erred in failing to dismiss them.

III. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's order granting partial summary judgment in favor of Snyder and Hannah on the issues of damages and derivative claims and should reverse the trial court's order denying partial summary judgment as to the corporate perquisite claims and dismiss those claims as well.

DATED: February 13, 2008

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 13th day of February, 2008, I caused to be sent via hand delivery, copies of the following documents:

- Reply Brief
- Proof of Service

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